19-P-178 Appeals Court

ELIZABETH FRAZIER & another[1] vs. ANGEL CONRAD FRAZIER & another.[2]

No. 19-P-178.

Nantucket. November 8, 2019. - December 30, 2019.

Present: Kinder, Neyman, & Wendlandt, JJ.

Grandparent. Minor, Visitation rights. Practice, Civil, Complaint, Motion to dismiss.

Petition filed in the Nantucket Division of the Probate and Family Court Department on July 9, 2018.

A motion to dismiss was heard by Randy J. Kaplan, J.

Mary-Ellen Manning for the grandparents.
David E. Cherny (Joana L. Stathi also present) for the mother.

WENDLANDT, J. In Blixt v. Blixt, 437 Mass. 649, 665-666 (2002), cert. denied, 537 U.S. 1189 (2003), the Supreme Judicial Court set forth certain pleading requirements for a petition

[1] J Pepper Frazier.

[2] J Pepper Frazier, II.

under G. L. c. 119, § 39D (grandparent visitation statute), pursuant to which a grandparent may seek visitation with a child over the objection of the custodial parent who has a fundamental constitutional right to make basic determinations for the child's welfare. The court set forth two situations pursuant to which a grandparent could seek visitation: first, where the grandparent alleges a preexisting relationship with the subject children and second, where the grandparent did not have a preexisting relationship with the grandchildren. In Martinez v. Martinez-Cintron, 93 Mass. App. Ct. 202, 205-206 (2018), we applied Blixt in light of the notice pleading requirements for civil complaints delineated in Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), to a petition pursuant to the second basis. This case presents occasion to apply Blixt in view of Iannacchino to the first basis. Because the petition here and accompanying affidavits fail to set forth sufficient allegations plausibly suggesting the type of relationship required to rebut the presumptive validity of the parental decision concerning grandparent visitation, we affirm.

Background. We briefly summarize the facts, assuming as we must that the allegations of the paternal grandparents' petition are true and drawing any reasonable inferences therefrom in their favor. See Warner-Lambert Co. v. Execuquest Corp., 427 Mass. 46, 47 (1998). At the time of the petition at issue on

appeal, the defendants Angel Conrad Frazier (mother) and J Pepper Frazier, II (father) were in the midst of divorce proceedings. By stipulation, the mother was granted temporary sole physical and legal custody of the children,[3] while the father's parenting time was limited to three hours each week on Sunday mornings because of his substance use disorder. The paternal grandmother, Elizabeth Frazier, and the paternal grandfather, J Pepper Frazier, filed a petition pursuant to the grandparent visitation statute for visitation, along with a motion to establish visitation and supporting affidavits.

The paternal grandparents alleged "a significant relationship between the grandparent(s) and the child(ren) and that it is in the best interest of the minor child(ren) that petitioner(s) be granted visitation with the child(ren)." Specifically, the paternal grandmother averred that she had a "close relationship" with the children. She explained that the paternal grandparents had "over the years enjoyed many activities" with the children, including "lunches, dinners, and visits." The children took sailing lessons at the paternal grandparents' yacht club, swimming lessons at another Nantucket club, and tennis lessons at both clubs. They also attended a weekly bingo night at the paternal grandparents' golf club,

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[3] At that time, the three children were respectively nine, seven, and six years old.

along with their cousins, and enjoyed holidays with the paternal grandparents by visiting their home in Florida (although the children stayed at a nearby house rented by their parents).

The paternal grandfather similarly averred that he enjoyed a "close personal relationship" with the children and spent time with them over meals and holidays. He was particularly close with his namesake grandson whom he described as "very garrulous and affectionate" towards him.

The mother opposed visitation between the children and the paternal grandparents outside of the father's weekly three-hour long parenting time and moved to dismiss the petition. Following a nonevidentiary hearing, the Probate and Family Court judge dismissed the petition. The paternal grandparents appealed.[4]

Discussion. We review an order allowing a motion to dismiss de novo. Martinez, 93 Mass. App. Ct. at 204. "We accept as true the allegations in the complaint and draw every reasonable inference in favor of the plaintiff." Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011). As set forth supra, two Supreme Judicial Court decisions -- Blixt and Iannacchino -- guide our analysis of the paternal grandparents' petition.

[4] A suggestion of death was filed as to the paternal grandfather in March 2019, while this appeal was pending.

1. Pleading requirements of Blixt. In Blixt, the Supreme Judicial Court interpreted the grandparent visitation statute[5] to require that, in any petition for grandparent visitation, "a parental decision concerning grandparent visitation be given presumptive validity." 437 Mass. at 657-658. To rebut this constitutionally mandated presumption, the grandparent must allege and prove "that the failure to grant visitation will cause the child significant harm by adversely affecting the child's health, safety, or welfare." Id. at 658. As discussed supra, the court recognized that this showing of "significant harm" may arise either (i) in the context of "a significant preexisting relationship" or (ii) "[i]n the absence of such a relationship, [a] grandparent . . . [may prevail only by showing] that visitation . . . is nevertheless necessary to protect the child from significant harm."[6] Id.

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[5] The grandparent visitation statute provides, in relevant part:

> "If the parents of an unmarried minor child are . . . under a temporary order or judgment of separate support . . . the grandparents of such minor child may be granted reasonable visitation rights to the minor child during his minority by the probate and family court department of the trial court upon a written finding that such visitation rights would be in the best interest of the said minor child."

G. L. c. 119, § 39D.

[6] As set forth supra, we addressed the pleading requirements for the second situation in Martinez, 93 Mass. App. Ct. at 205.

In addition, to protect the parent from "the burden of litigating a domestic relations proceeding[, which] can itself be so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated," the court established certain, heightened pleading requirements for a grandparent seeking visitation. Blixt, 437 Mass. at 666, quoting Troxel v. Granville, 530 U.S. 57, 75 (2000). Specifically, a grandparent's complaint must make an initial showing that she can meet the burden of proof. Blixt, supra. To do so, the complaint must "be detailed and verified or be accompanied by a detailed and verified affidavit setting out the factual basis relied on by the [grandparents]." Id.

2. Notice pleading requirements. Since Blixt was decided, the Supreme Judicial Court revisited the notice pleading standard for civil complaints. The prior standard provided "that a complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Nader v. Citron, 372 Mass. 96, 98 (1977), quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In Iannacchino, the Supreme Judicial Court revised the notice pleading standard, such that, to survive a motion to dismiss, a complaint must include "factual 'allegations plausibly suggesting (not merely

consistent with)' an entitlement to relief." Iannacchino, 451 Mass. at 636, quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007).

3. Analysis of pleadings. Applying the pleading requirements of Blixt in view of Iannacchino to the present petition, the paternal grandparents allegations do not suggest the type of relationship with the children plausibly suggesting a right to relief -- that is, nothing in the allegations plausibly suggests that the children will be significantly harmed unless the mother's right to determine what is in her children's best interest is overridden. Our decision in Dearborn v. Deausault, 61 Mass. App. Ct. 234 (2004), is instructive. There, a mother appealed from an order permitting a grandfather to have visitation rights over her objection. Id. at 234. The judge found that the grandfather saw the children several times per month, took them to local fairs and on camping trips, and babysat them when the mother was busy. Id. at 235. On appeal, we held that the described relationship between the grandfather and the children was insufficient to rebut the presumptive validity of a mother's decision to deny visitation. Id. at 237-238.

The relationship, as alleged in the present petition, is similar to the relationship in Dearborn. It consists of shared meals, visits, vacations, and holidays and includes providing

access to extracurricular activities at the paternal grandparents' clubs. While apparently nurturing and enriching, the relationship is not "such as de facto parents or other relationships of close bonding, where significant harm may be readily inferred from and is inherent in the disruption of that relationship." Dearborn, 61 Mass. App. Ct. at 238. Such a relationship is not enough to meet the showing of a "significant" preexisting relationship such that "significant harm to the children may be inferred from disruption alone." Id. As such, the petition fails to set forth factual allegations "plausibly suggesting" a right to relief for any claim under Iannacchino, 451 Mass. at 636, quoting Bell Atl. Corp., 550 U.S. at 557, let alone meet the heightened pleading requirements of Blixt.[7]

We are not unsympathetic to the paternal grandmother's desire to maintain a relationship with the children. With regard to her contention that, because she has a preexisting relationship with the children, she is entitled to an

[7] The paternal grandmother also maintains that the pleadings sufficiently alleged significant harm to the children, relying on an encounter that resulted in some "[dis]comfort[]" for one of the children (who was directed by the mother not to speak to the paternal grandmother); however, the incident is not the type of behavior plausibly suggesting that the children are at risk of significant harm. Compare Sher v. Desmond, 70 Mass. App. Ct. 270, 282-284 (2007) (allegations of prolonged physical abuse of mother by father sufficient to show significant harm to children).

evidentiary hearing, however, our analysis must be guided by "[t]he liberty interest at issue in this case -- the interest of parents in the care, custody, and control of their children -- [which] is perhaps the oldest of the fundamental liberty interests recognized by this Court" (citation omitted).[8] Martinez, 93 Mass. App. Ct. at 205. Parents "need to [be] protect[ed] . . . from unnecessary litigation and 'all the attendant stress and expense' that comes with it." Id., quoting Blixt, 437 Mass. at 666.

Attorney's fees. The mother's request for appellate attorney's fees is denied. See Mass. R. A. P. 16 (a) (10), as appearing in 481 Mass. 1628 (2019); G. L. c. 215, § 45; Matter of the Estate of King, 455 Mass. 796, 803 (2010).

Judgment affirmed.

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[8] The paternal grandmother's allegations of domestic violence perpetrated by the mother against the father are not properly before us. The judge properly declined to take judicial notice of them. See Care & Protection of Zita, 455 Mass. 272, 282 (2009); Cannonball Fund, Ltd. v. Dutchess Capital Mgt., LLC, 84 Mass. App. Ct. 75, 91 (2013). Thus, the mother's motion to strike portions of the paternal grandmother's brief pursuant to Mass. R. A. P. 16 (e), as appearing in 481 Mass. 1628 (2019), is allowed insofar as it concerns pages twenty-one through twenty-four. See Boston Edison Co. v. Brookline Realty & Inv. Corp., 10 Mass. App. Ct. 63, 69 (1980). We deny the paternal grandmother's motion, filed the day before oral argument in this court, to supplement the record with an affidavit (which was not presented to the judge). See Adoption of Inez, 428 Mass. 717, 722 (1999). At oral argument, the parties agreed that these new allegations can be presented, in the first instance, to the judge.